

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 17TH DAY OF APRIL 1998

BEFORE

THE HON'BLE MR.JUSTICE H.N. NARAYAN

CIVIL REVISION PETITION NO.4172 OF 1997

Between

Seven Hills Distilleries Pvt.Ltd.,
Pavagada Road, Challakere Taluk,
Chitradurga Dist., represented by
its Managing Director Shri D.Sudhakar.

..Petitioner

(By Sri G.Krishna Murthy, Adv.)

And

Shri D.Suresh Kumar, major,
s/o Shri N.Dasharathaiah,
Proprietor, M/s Srinivasa
Enterprises, Pinto Road,
Hubli - 20, Dharwad Dist.

..Respondent

(By Sri G.S.Visweswara, Adv.)

This revision is filed under Section 115 CPC against the order dt.9.12.1997 passed by the Civil Judge, Chitradurga, setting aside the orders on I.A.1 and 2 in O.S.184 of 1996, pending on the file of the Munsiff, Challakere, allowing the appeal and setting aside the order passed in O.S.184 of 1996.

This petition having been reserved, the Court made the following:

ORDER

This is the plaintiff's revision against the divergent views expressed by the Courts below in the matter of discretionary order of the Court

under the provisions of O.39 Rules 1 and 2 CPC. The trial Court having exercised the jurisdiction vested in it, confirmed the ad interim order of injunction granted in favour of the plaintiff which is reversed in appeal by the Civil Judge (Sr.Dvn.).

2. The parties are the full brothers who have started Distillery Company in the name of "Seven Hills Distilleries Private Limited" - a company incorporated under the Companies Act in the year 1991-92. Differences appeared to have arisen between the brothers thereafter. The parties are the founder directors and are appointed for life time and the Articles of Association provided to them to hold that office until resignation voluntarily or death. The respondent herein in particular has invested Rs.ten lakhs in the said business. However, the plaintiff company represented by Sri D.Sudhakar - Managing Director with another brother were exclusively managing the company, as according to them, the defendant respondent started working against the interest of the company and therefore, they thought of removing him from the lifetime directorship and called for an extraordinary General Body Meeting on 18.9.1995

in the registered office of the Company, Challakere and all the directors except the defendant attended the meeting and they resolved to do away with the system of having lifetime directors and resolved to amend the Article 19(B) of the Articles of Association and introduced amended article which provide for retirement of directors except the Managing Director by rotation. To ratify the said resolution, they also convened Annual General Body Meeting on 30.9.1995. The defendant has also not attended the said meeting and he was not re-appointed as the director in the General Body Meeting and therefore the defendant ceased to be the director of the Company. The allegations of the plaintiff at this stage is though the defendant ~~is~~ ceased to be the director of the Company, he started interfering with the Company affairs and therefore, filed the suit initially for permanent injunction and by an amendment thereafter sought an additional relief of declaration declaring that the defendant is no longer the director of the company. The plaintiff has also filed an application under 0.39 Rules 1 and 2 CPC for grant of an order of injunction which was initially granted ad interim.

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3. The defendant who entered appearance through his counsel raised several objections to the application contending that he is a life time director and the Articles of Association do not provide for removal of life time directors and that he has not been served with any notice of either Extraordinary General Body Meeting held on 18.9.1995 or the Annual General Body Meeting held on 30.9.1995. He has seriously disputed convening of any such meetings. More over, as the financier director, he has invested Rs.ten lakhs in the Company and that he cannot be removed strengthily and therefore, there cannot be any injunction against him.

4. The trial Judge rejected these contentions of the defendant holding that Articles of Association permit an amendment by General Body Meeting and that in spite of service of notice, the defendant remained absent to the said meetings and that after General Body Meeting wherein he did not apt to contest for directorship, he cannot interfere with the management of the Company. The trial Court is of the opinion that the defendant is served with notice to attend the said meetings and

therefore, the trial Court has come to the conclusion that it is a fit case to exercise the discretionary jurisdiction and granted an order of injunction restraining the defendant from interfering with the affairs of the plaintiff Company. Incidentally, the contention of the defendant that the suit is not maintainable has been rejected.

5. Aggrieved by the said order, the defendant has challenged the same before the Civil Judge (Sr.Dn.) in M.A.9 of 1997. The same contentions were urged before the First Appellate Court, which has no doubt started assigning reasons having regard to the principles governing for grant or refusal of temporary injunction, pending disposal of the suit. But what I find, to my surprise, in the impugned order is that nowhere the ^{appellate} ~~trial~~ Court has said that the order in challenge in appeal is capricious, unlawful or suffers for want of proper exercise of jurisdiction. Upon perusal of the material placed before it and on considering the rival contentions of the parties, the First Appellate Court has come to ^a ~~to~~ different conclusion holding that it is not a fit ^a case to exercise

discretion in favour of the plaintiff and therefore reversed the order. In its opinion there is no serious question to be determined in the suit or there is likelihood of plaintiff succeeding in the suit and even the balance of convenience and irreparable loss and injury is not in favour of the plaintiff. It is these very contentions which are now raised in this revision also by the learned counsel for the respondent justifying the order of the First Appellate Court.

6. I have heard the detailed argument of the learned counsel on both side. Sri G.Krishna Murthy - learned counsel for the petitioner has submitted that the Articles of Association are amended by virtue of provisions of Section 284 of the Companies Act ("the Act" for short) coupled with Section 53 of the Act. The material produced by the plaintiffs clearly shows the non-co operation of the defendant in the day-to-day business of the Company, more over he has started his own business at Hubli and he has taken a negative attitude of the Company's business. Though he is a lifetime director, the other directors preferred to amend the Articles of Association to remove this clause

in the Articles of Association. Therefore, they initially called for an extraordinary General Body Meeting wherein the directors of the Company took a decision to amend the Articles of Association referable to the removal of life time director or continuation thereof and thereafter they convened the Annual General Body Meeting requiring the Body to ratify the resolution of the Extra ordinary General Body Meeting. It is also his submission that the defendant preferred to keep away from the meeting and therefore did not participate and apt for the directorship and therefore he ceased to be the director of the Company and he has no right to interfere with the affairs of the Company. As such, he is liable to be restrained from interference of the Company affairs.

7. Sri G.S.Visweswara - learned counsel for the respondent has strongly contended that the plaint is silent insofar as convening of Extra ordinary General Body Meeting on 18.9.1995 ^{and} notice to the defendant and plaint as originally filed has no pleading with reference to the issue of notices. Therefore, the plaintiff has initially suppressed the very material fact in order to

obtain an equitable relief in the hands of the Court. Even the amended plaint does not refer to the date of discharge of notice to the defendant and service of the said notices. Therefore, the allegations of issue of notices in the subsequent pleading are all manipulations subsequently found in order to suit the convenience of the plaintiff. According to him, the defendant is a major investor to the business of the Company and to keep him away from the business would virtually throwing a man who has invested his hard earned money in his business and a whole time director cannot be removed in this unholy fashion without service of notice contemplated in the Articles of Association. The temporary injunction cannot be granted where the main relief is also the same. His further contention is that the learned Munsiff has not applied his mind to these questions; he found fault with the observations of the trial Court regarding acceptance of resolution by the Company Secretary and issue of certificate to that effect is of no consequence and in fact, according to him this very fact weigh too much with the learned Munsiff in exercising the discretion in favour of the plaintiff. Therefore, according to him, the

First Appellate Court is perfectly justifiable in reversing the order of the Munsiff thereby setting aside the order of injunction which the plaintiff otherwise is not entitled in the light of the facts enunciated in the order of the Court below.

7. However, it is contended by the petitioner's counsel by way of reply that notice contemplated for General Body Meeting is only an ordinary post. The letter is addressed to the correct address, there is sufficient compliance of legal requirement. According to him once the Court had exercised its discretion, the Appellate Court must be slow to interfere with the order unless the discretion itself is not judiciously exercised or the order is perverse or otherwise illegal if allowed to continue would cause injustice to the other side. Therefore, according to him, the First Appellate Court erred in reversing the order of a trial Court. It is also his submission that the affidavit from the courier service is now filed in this revision which this Court can take note of as an additional material in support of his case. Learned counsel have mainly relied upon few

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decisions of this Court insofar as the law regarding injunctions and a decision of the Supreme Court insofar as the presumption of postal service.

8. I have given my careful considerations to these contentions. I have carefully perused the Annexures produced before me and the pleadings.

9. The short question that arises for consideration is whether the First Appellate Court is right in interfering with the order of the trial Court in the discretionary order granted u/o 39 Rules 1 and 2 CPC. The exercise of powers by the Courts under O.39 Rules 1 and 2 and the principles applicable to grant of injunctions is elaborately discussed in ^{the} two decisions of this Court reported in SRI GOWRISHANKARA SWAMIGALU VS. SRI SIDDHAGANGA MUTT (ILR 1989 Kar.1701) and BANGALORE L.I.C. EMPLOYEES HOUSING CO-OP. SOCIETY LTD. (ILR 1988 Kar.2817). In the course of the judgment in SRI GOWRISHANKARA SWAMIGALU's case, His Lordship Justice Shyamsundar (as he then was) has referred to series of decisions on the question including the two decisions of this Court rendered in LAKSHMINARASIMHAIAH VS. YALAKKI GOWDA (1965(1)

Mys.L.J.370) and LAXMIMANOJANA VS. SUJNANDRA (1970 (2) Mys.L.J. 82). It is pertinent to note that His Lordship Hon'ble Justice Govinda Bhat (as His Lordship then was) in LAKSHMINARASIMHIAH's case held as follows:

"What the Court of appeal has to consider is simply whether or not the Judge who dealt with the matter has properly exercised the discretion which he undoubtedly possesses. The Appellate Judge is not to approach the case as if he were the trial Judge. The granting or refusing of injunction is a matter resting in the sound discretion with the trial Court and consequently no injunction will be granted whenever it will operate oppressively or inequitably or contrary to the real justice of the case."

Justice Santosh (as he then was) in LAXMIMANOJANA's case has stated as follows, insofar as exercise of power by the Appellate Court in these matters:

"If the discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the Appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion; but if it appears to the Appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts then it would be open to the Appellate Court to interfere with the trial Court's exercise of discretion."

A detailed reference is also made in GOWRISHNKARA SWAMIGALU's case to AMERICAN CYNAMID CO. VS. ETHICON LTD. (ILR (Kar_1976)1) 426). It is unnecessary for me extract and repeat the rulings of those decisions in the light of repeated enunciation of law by this Court and the Apex Court. Therefore, the question for consideration at this length of time is whether the trial Court has exercised its jurisdiction properly and judiciously. If so, whether the First Appellate

Court has committed an error in reversing the said order. Therefore, grant of injunction has to pass through the following tests:

- (1) Prima facie case.
- (2) Balance of convenience
- (3) Irreparable injury to the plaintiff
- (4) Whether there any over-riding consideration that weigh with the grant or refusal of injunction.

10. To find out whether the prima case did exists or not, it was not necessary to hold a mini trial at the threshold. but it is sufficient if an endeavour is made by the Court to identify that the suit claim was neither vexatious or too casual for consideration. The following observation is made in L.I.C. VS. BANGALORE L.I.C.E.H.C.S. LTD., case at para 24:

"The preventive remedy of injunction is thus granted as an instant antidote to stop or prevent the invasion of the plaintiff's rights in regard to which a complaint is made. The Court having

regard to the expediency involved should not embark upon a nit-picking operation at that stage by holding a mini trial to lay thread-bare the case of the plaintiff to find out if a prima facie case is made out or not. It would be sufficient if the Court is assured that questions raised by the plaintiff are not vexatious or too casual, but are such as to merit serious consideration at a subsequent stage."

11. In NAGARAJ VS. KRISHNA (1996(5) Kar.L.J.421) His Lordship Justice Harinath Tilhari has held as follows:

"Prima facie case has always got to be distinguished from prima facie title. The prima facie case really means that there is a case which requires trial and that the case is not the one based on erroneous and vexatious grounds. When deciding the question prima facie case, it is generally not desirable and open

for the Court to record a decision on the merits of the pleas taken in the suit."

11. The plaintiff who has filed a suit for bare injunction has now converted it as a suit for declaration. The declaration sought for by the plaintiff is that the defendant is no longer a director of the plaintiff Company. Now it is the contention of the plaintiff that by virtue of a resolution passed by in the Extraordinary General Body Meeting convened on 18.9.1995 to take a decision to amend the Article 19(A) and (B) of the Articles of Association and in spite of service of notice to the defendant through courier service, remained absent and Annual General Body Meeting was convened on 30.9.1995 and a notice through post was sent to the defendant and the defendant did not attend the meeting. He did not apt to get himself elected^{to} the Board of Directors as per the amended Articles of Association and therefore, he could not have interfered with the affairs of the Company.

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12. I have already extracted the defence pleaded by the defendant wherein he has completely denied the convening of those two meetings and receipt of meeting notices as alleged. Therefore, according to him, the Board of Directors could not have removed the life time director and thereby restraining him from participating from the plaintiff's company's business. These facts clearly show that there is a serious question to be tried at the trial. The question is whether there is sufficient material on record to presume that notices have been served upon the defendant as contended by the plaintiff. In fact, strenuous arguments were addressed in this regard only. Even establishment of a prima facie case does not enable the Court to grant an order of injunction on that ground alone.

13. On careful perusal of detailed discussion made by the First Appellate Court, discloses, that the First Appellate Court has embarked upon a mini trial to find out whether there is issue of notice to the defendant as contended by the plaintiff and whether there is service of notice which ultimately decides the status of the defendant. According to

the plaintiff, notices were sent initially through courier to attend the Extra ordinary meeting that was convened on 18.9.1995 and to attend the second meeting, a notice through post was sent. Plaintiff has produced receipt for having served the notice in the office of the defendant at Hubli. It is strenuously contended by Sri G.S.Visveswara that somebody might have concocted the document. These contentions can only be gone into at the trial. There is some material on record prima facie showing that the meeting notice was sent through courier service which was served in the office of the defendant. The plaintiff has now filed an affidavit of the courier service in this revision by way of an additional evidence which in my opinion cannot be looked into as the Courts below had no occasion to consider this affidavit.

13. However, there is nothing on record to show that the defendant was in the habit of receiving all postal letters or other letters addressed to him personally in his office. It is a fact that he is running an established office at Hubli and the letter was received under the seal of his office. Prima facie at this stage, it cannot

be stated that the plaintiff has manipulated with the service of notice. Insofar as the postal notice sent to the defendant to the correct address to attend the Annual General Body Meeting convened on 30.9.1995, we had to ~~pre~~^{pres}ume that the letter duly addressed would reach the addressee in normal course and there is compliance of legal requirement insofar as the service of notice to the defendant to attend the Annual General Body Meeting. The defendant has not been able to point out the inadequacy of service to any member or director of the company in this regard. It is a fact that he has almost separated from the plaintiff and established his own company at Hubli. The material on record clearly shows that he has taken a negative attitude towards running of the company's business. In fact, he has lodged complaints to the Excise Commissioner and the Government resulting in L.A. questions in the State Assembly regarding the conduct of the business of the plaintiff Company leading to filing of criminal cases against the plaintiff Company. A person who was really interested with the affairs of the Company would not have acted so carelessly specially when two meetings were convened and directors and the

members of the Company duly attended those meetings to take important decisions and passed resolutions as to the status of the defendant himself. These facts really weigh with the Court to hold that there is a serious case for the trial. However, the First Appellate Court has in fact made a detailed discussion of this very contention and answered the said contention in favour of the defendant and thereby virtually giving the finding on the question. In fact, the trial Courts were reminded of this danger of holding a mini trial though it is essential for the Courts to make a casual reference to the documents and the other material produced for its satisfaction.

14. The two other aspects which need consideration even at this stage are the balance of convenience and irreparable injury to the plaintiff if an order of injunction is refused and what are the over-riding considerations that weigh with the Court to pass such an order.

15. Sri G.S.Visweswara - learned counsel for the respondent has no doubt commented upon certain opinions expressed by the learned Munsiff regarding

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furnishing the copy of the resolution to the Company Secretary and the certificate issued by him which according to the learned Munsiff would show the legality of the meetings and resolution passed at the General Body Meetings. There is some force in his contention. However, the trial Judge has nowhere stated that this observation has led him to pass an illegal and capricious order. The First Appellate Court has noticed not with certainty *That,* furnishing of Form No.23 with the Registrar of the Companies within 30 days. Parties have produced xerox copies of Form No.23 and the dates mentioned therein. Learned counsel for the petitioner has attempted to explain that the date found therein as '20.9.1996' as the date of the copy application filed by the plaintiff and not the date of receipt of Form No.23 by the office of the Registrar of the Companies. However, it is difficult from the perusal of this document to affirmatively state whether it was so received by the Registrar of the Companies on 20.9.1996. But non-submission of *Form* No.23 with the Registrar of the Companies does not annul the resolution as such.

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16. It is true that the pleadings filed before the Court by the plaintiff is not satisfactory in this aspect in spite of further amendment to the plaint. But having regard to the principle of pleadings that evidence and arguments is no part of pleadings, ^athe argument of the learned counsel for the respondent is difficult to accept in toto.

17. The conduct of the defendant - respondent in this particular case is also ^arelevant factor to be taken into consideration. The respondent was a life time director along with his brothers - the plaintiffs. He was virtually removed from that ~~post~~ as director by resolution of directors and the general body. It is not his case that he was not aware of these resolutions at all. The resolutions were passed long back i.e., in October and September, 1995. He has not questioned the legality of the action taken in this regard by the plaintiffs removing him from the directorship without the authority of law. This conduct of the respondent is really surprising in view of the huge amount invested by him. In fact, at one stage the plaintiff company offered a substantial sum for the defendant to go out of the company which was not

acceptable to him. This is, in my opinion, one of the strangest circumstances that goes against him requiring the Court ~~not~~ to ask him ^{not} ~~not~~ to interfere with the affairs of the Company. But as held in the case of L.I.C. VS. BANGALORE L.I.C.E.H.C.S. LTD., the Courts cannot pass blanket order of injunction specially where the defendant or defendants are likely to put to untold hardship and an order has to be passed in terms. The plaintiffs have also invested huge amount. They are running their business in excise. As submitted by the learned counsel for the petitioners, the business itself involves personal and financial risks. If the defendant were to interfere in the business of the plaintiff, it would definitely harm the interest of the plaintiffs. Therefore, the discretion exercised by the trial Court, in my opinion, is not unreasonable or capricious nor has it ignored relevant factors. But having regard to the facts involved in this case, the interest of the defendant must necessarily to be protected by the Courts setting out terms. Defendant holds substantial shares of more than Rs.ten lakhs. He ^{is} ~~has~~ no doubt not responsible for all the mis deeds of the plaintiffs as he is keeping ^{away} ~~out~~ from the

company's affairs for a long time. However, according to the plaintiff, the defendant ^u~~has~~ continued to be an ordinary share holder of the Company. Having regard to the extra investment made by him, plaintiffs have necessarily to set apart his 1/3rd share out of the profits earned by the plaintiff Company till the disposal of the suit.

18. The First Appellate Court while interfering with the said order has made much on the question of service of notice to the defendant. It is upon this question alone that the First Appellate has reached this conclusion. The question is whether the First Appellate Court is right in reversing the order on this ground alone only because it has come to a different conclusion. Therefore, in my opinion, the discretion exercised by the trial Court is liable to be confirmed by reversing the order of the First Appellate Court.

19. In the result, the revision is allowed. The impugned order passed by the learned Civil

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Judge is set aside restoring the order of
injunction granted by the trial Court.

Sd/-
JUDGE

Ksj/-